TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH, AND GEORGE B. COOKSEY, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF DAVID DOWS, SENIOR, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THEODORE P. GILMAN, COMPTROLLER OF THE STATE OF NEW YORK, AND BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED JUNE 20, 1901.

(18,204.)

(18,204.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 351

ALEXANDER E. ORR, RICHARD M. HOE, TRACY DOWS, WILLIAM A. NASH, AND GEORGE B. COOKSEY, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF DAVID DOWS, SENIOR, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THEODORE P. GILMAN, COMPTROLLER OF THE STATE OF NEW YORK, AND BIRD S. COLER, COMPTROLLER OF THE CITY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

INDEX.

	Original.	Print.
Papers on appeal from appellate division	*a*	1
Statement	*b*	1
Stipulation as to papers before the surrogate	1	1
Petition	2	2
Exhibit A—Will of David Dows, Senior	5	3
Exhibit B—Will of David Dows, Junior, third paragraph	18	11
Order appointing appraiser	22	13
Report of appraiser	23	14
Objections filed with appraiser	34	20
List of stocks referred to in objection IV (the same being stocks in incorporated companies liable to taxation on their capital)	40	24
Order assessing tax	42	25
Notice of appeal to surrogate	44	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1901.

	Original.	Print
Order of surrogate from which appeal was taken to appellate division	51	29
Notice of appeal to appellate division (executors)	52	30
Notice of appeal to appellate division (guardians)	54	31
Affidavit of no opinion	55	31
Certificate of clerk of surrogate's court	56	32
Order of affirmance by appellate division	57	32
Certificate of clerk of appellate division	59	33
Notice of appeal to court of appeals	60	33
Affidavit of no opinion	67	37
Certificate of clerk of surrogate's court	68	37
Opinion of appellate division In matter of Vanderbilt, 50 App. Div., 246	69	38
Remittitur from court of appeals	77	43
Certificate to opinion of court of appeals	79	44
Opinion of court of appeals	80	44
Order on remittitur	87	48
Petition for writ of error	90	49
Allowance of writ of error	92	51
Assignment of errors	94	51
Writ of error	101	55
Citation	104	57
Waiver of service of citation, &c.	106	57

a

Copy — Remittitur from

Court of Appeals of the State of New York.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Papers on Appeal from Order of the Appellate Division, First Department, Affirming an Order of the Surrogate of New York County Affirming an Order Fixing and Assessing Tax.

Horace E. Deming, attorney for appellants, 11–13 William street, borough of Manhattan, New York city.

Joseph W. Middlebrook, attorney for respondents, 130 West Main street, Tarrytown, N. Y.

b

Statement.

Surrogate's Court, County of New York.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

This proceeding was begun by the filing of the petition and the entry of the order appointing the appraiser October 31, 1900. The names of the original parties are as follows: The Comptroller of the State of New York and the Comptroller of the City of New York, petitioners, appearing by Joseph W. Middlebrook, their attorney; Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as trustees and executors of the last will and testament of David Dows, Sr., deceased; Tracy Dows and Richard M. Hoe, as executors of the last will and testament of David Dows, Jr., deceased; and Tracy Dows and Richard M. Hoe as guardians of David Dows, 3d, Robert Dows and Kenneth Dows appearing by Horace E. Deming, their attorney. There has been no change of parties or attorneys.

1

Stipulation.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of DAVID DOWS, SENIOR, Deceased.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that there is no dispute as to the facts appearing before the appraiser, and that the following printed copies of the papers on file contain all the facts upon which arise the matters in controversy and shall constitute all the papers upon which shall be heard the appeal to the surrogate from the report of

as well as in the house, or on the premises occupied by me as a summer residence at Irvington, in Westchester county in the State of New York and known as Charlton Hall. I also give and bequeath to my said wife the sum of fifty thousand dollars ($50,000) to be paid to her within one calendar month after my decease. I also give and bequeath to my said wife the sum of four hundred thousand dollars ($400,000), and I direct, that, so soon as practicable after my decease, the said sum be paid to her out of my estate and that in the meantime and until said sum be so paid she receive quarterly out of my estate interest upon said sum at the rate of four and one-half per cent. annually.

6 Third:—I give and devise unto my executors hereinafter named, (or to such of them as may qualify), and the survivors and survivor of them and the successors to their trust, and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors and the survivors and survivor of them and the successors to their trust, the premises where I now reside in the city of New York, on the corner of Fifth avenue and Sixty-ninth street in the said city, together with the outbuildings and the lots of land on which the same are built and all things appurtenant, as well as the premises at Irvington, Westchester county in the State of New York, known as Charlton Hall, with the buildings, improvements and all things thereunto appurtenant in trust to hold the same to and for the use of my said wife and of any others or other of my family whom she may request to reside with her, so long as my said wife shall live; and I give and grant unto my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust full power and authority to grant, bargain, sell and convey said premises, or either of them, or any part thereof, upon such terms and in such manner as in their discretion may seem wise and either at public or private sale, provided however, that if such sale be made during the lifetime of my said wife her consent thereto must first be obtained, such consent to be evidenced by her joining in the deed or deeds of conveyance. The proceeds of such sale shall be and become part of my residuary estate and shall be subject in all respects, as to their disposition, to the provisions and requirements in respect to my residuary estate as set forth hereinafter in this my will.

7 Fourth:—I hereby require and direct that so soon as practicable after my decease, there shall be set apart out of my estate and invested a sum or sums, not to exceed, however, in the aggregate two hundred and fifty thousand dollars ($250,000) the income of which shall be used to pay the expense of keeping the premises described in the preceding (third) paragraph of this my will in good tenantable order and repair and to pay all taxes and assessments as well as expenses for insurance upon said premises during the lifetime of my said wife, unless said premises be sooner sold; the surplus if any, of income, over and above such expenses, to be reinvested and become part of the principal of said fund so set apart. Upon the death of my said wife, or upon the sale of said premises, prior to her decease, said fund, with all accumulations

thereof, shall be and become part of my residuary estate and shall be subject in all respects, as to its disposition, to the provisions and requirements in respect to my residuary estate as set forth hereinafter in this my will.

Fifth:—I give and bequeath to my son, David Dows, Jr., any and all advancements made to him, which are, or shall be charged on my books to him as an advancement on account of his interest in my estate. I also give and bequeath to my son, David Dows, Jr., the sum of four hundred thousand dollars ($400,000) and I direct that so soon as practicable after my decease the said sum be paid to him out of my estate, and that in the meantime, and until said sum be so paid, he receive quarterly out of my estate interest upon said sum at the rate of four and one-half per cent. annually. But if my said son die before me leaving children, or the issue of his deceased children him surviving I give and bequeath said sum of four hundred thousand dollars ($400,000) free and clear of any and all claims because or by reason of any advancements made to my said son in his lifetime on account of his interest in my estate to said children
8 of my said son share and share alike, and to said issue of his deceased children (such issue to take share and share alike the portion which the parent would have received by the terms hereof if living) to be paid to them as each attains the age of twenty-five years, together with all accumulations of interest, income and profits.

"Sixth:—I give, bequeath and devise the property hereinafter and in this sixth paragraph of this my will mentioned and described unto my executors hereinafter named (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust to have and to hold the same in trust, subject to the conditions and qualifications hereinafter contained, with power, during the continuance of such trust, to collect and receive the rents, income and profits, to manage, repair, build, rebuild and improve said property in their discretion (the expenses incident to the performance of such trust to be paid out of the rents, income and profits of said property) and to pay the surplus of said rents, income and profits over and above said expenses to my son David Dows, Jr., from time to time as the same accrue during his lifetime. And upon the death of my said son the said property with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may, by his last will and testament designate and appoint and in such manner, and upon such terms, as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike,
9 and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have re-

ceived by the terms hereof if living) to be paid to them at the times and in the proportions following, to wit: As each attains the age of twenty-one years there shall be paid to him or her a sum not to exceed fifty thousand dollars ($50,000); as each attains the age of twenty-five years a further sum not to exceed one hundred thousand dollars ($100,000); as each attains the age of thirty years the remainder, if any, of the share of said property, with all accumulations of interest, income and profits to which he or she may be entitled; excepting, however, that the said children of my said son David Dows, Jr., and the said issue of his deceased children shall, each of them, receive from such share or portion of the property as is herein by this paragraph numbered sixth of this my will provided shall vest absolutely in such child, or issue of a deceased child, the entire income after he or she shall have attained the age of twenty-one years. And in case my said son David Dows, Jr., die leaving no children him surviving, nor issue of deceased children, then said property shall vest absolutely and at once upon his decease, share and share alike, in my wife Margaret E. Dows, if she survive him, and the brothers and sisters of my said son, David Dows, Jr., him surviving and the lawful issue of his deceased brothers and sisters (such issue to take share and share alike the portion which the parent would have received by the terms hereof if living) subject to the same provisions as to times and proportions of payment of the principal and income of their respective shares as are hereinbefore provided in the case of the children and the issue of the deceased children of my said son David Dows, Jr.

And I give and grant unto my said executors (or to such of them as may qualify) and the survivors or survivor of them and the successors to their trust full power and authority to mortgage, grant, bargain, sell, and convey the said property, or any part thereof, or lease the same, or any part thereof, for a period not to exceed twenty years, upon such terms, and in such manner as in their discretion may seem wise, provided my said son, David Dows, Jr., consents thereto, such consent to be evidenced by his joining in the deed of conveyance or other instrument. And in case of such sale the proceeds thereof shall be invested to and for the use of my said son, David Dows, Jr., during his life in realty or otherwise, and in such manner as in the discretion of my said executors (or such of them as may qualify) or the survivors or survivor of them, or the successors to their trust may seem proper; and only the surplus of the rents, income and profits thereof, over and above expenses, shall be paid to my said son David Dows, Jr.; and I hereby give and grant the powers as to the mortgaging, sale and leasing of such realty as may be so purchased which are herein given with respect to the property given, bequeathed and devised by this the sixth paragraph of this my will.

The property given, bequeathed and devised by this, the sixth paragraph of this my will, is the following:

The property known as Columbia stores, now used for grain elevators and storage and including the lots on the corner of Columbia and Pacific streets, not now built upon, all situated in the city

of Brooklyn, county of Kings and State of New York, lying in the block bounded by Atlantic street on the north, the East river on the west, Pacific street on the south and by Columbia street and property of other owners on the east; also the property known as Dows stores, now used for grain elevators and storage, situ-
11 ated in said city of Brooklyn and lying in the block bounded by Columbia street on the east, Pacific street on the north, the East river on the west and on the south by that part of the same block now owned by the estate of Patchen; together with all the land and real estate, buildings and machinery, wharf rights and water rights belonging to each of said above described or mentioned properties and all other appurtenances thereto, excepting, however, two-sixteenths of said several properties which are held by me in trust for my partner, Alexander E. Orr."

Seventh:—To each of my children Annie L., Linda, Margaret W., Susan, Mary and Tracy and the issue of any of my said children who may die before me (such issue to take share and share alike the sum which the deceased parent would have received if living) I give and bequeath the sum of four hundred thousand dollars ($400,000) less, in the case of each child, the amount of any and all advancements made to said child which are, or shall be charged on my books to said child as an advancement on account of his or her interest in my estate, but without reckoning interest on said advancements from the time the same were made or charged; and I direct that so soon as practicable after my decease the amount due to each of my children under this provision of my will be paid to each of my said children, and that in the meantime, and until such payment be made, each of my said children receive quarterly out of my estate, interest at the rate of four and one-half per cent. annually upon the amount due him or her under this provision of my will.

Provided, however, that in the case of such of my children, or the issue of my deceased children, as shall not at the time of my decease have attained the age of twenty-five years the payment of the prin-
12 cipal of the sum herein by this provision of my will given and bequeathed to each such child, or issue of a deceased child shall not be made until he or she shall attain the age of twenty-five years; and provided, further that only so much of the income of said principal shall be paid to such child, or issue of a deceased child, during minority, as shall be requisite for the proper maintenance, education and support of such child in the discretion of his or her guardian; the surplus, if any, of said income, over and above such payments to be invested and become part of the principal.

And I hereby nominate, constitute and appoint my wife Margaret E. Dows guardian of such of my children as shall be minors at the time of my decease during his or her minority, and direct that she shall have the particular custody and care of the person and education of such of my children as are minors, and that her receipt shall be a sufficient voucher for such sums as shall be paid for, or on account of the support, education or use of any of my children during minority without further accountability by any of my executors.

"Eighth:—All the rest, residue and remainder of my estate, of whatsoever name and nature and wheresoever situated, I give, bequeath and devise to my executors hereinafter named (or to such of them as may qualify) and to the survivors and survivor of them and any successors to their trust, and I hereby direct that the title to the same shall, from and after my decease, be vested in my said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust, to have and to hold the same in trust subject to the conditions and qualifications hereinafter contained with full power and authority during the continuance of such trust to collect and receive the rents, income and profits, to grant, bargain, sell, convey, lease, invest, reinvest
13 in realty or otherwise, improve, repair and manage such estate and any part thereof according to their best judgment and discretion and to incur and pay all such expenses in the performance of their trust as in their discretion may seem proper, that is to say:—

One-eighth of my said residuary estate shall be so held in trust as aforesaid, for and during the lifetime of my wife, Margaret E. Dows;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my son, David Dows, Jr.;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter, Annie L. wife of Richard M. Hoe;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Linda wife of George B. Cooksey;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter, Margaret W., wife of Carroll Dunham;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Susan wife of Christian A. Herter;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my daughter Mary Dows;

One-eighth of my said residuary estate shall be so held in trust as aforesaid for and during the lifetime of my son Tracy Dows.

And the surplus of the rents, income and profits, arising from each such one-eighth part of my said residuary estate, over and above all expenses, shall be paid over from time to time as the same accrue to the person for, and during whose lifetime said one-eighth part
14 of my said residuary estate is so held in trust as aforesaid, and upon the death of said person said one-eighth part of my said residuary estate, which for and during the lifetime of such person had been so held in trust as aforesaid, shall, with all accumulations of interest, income and profits, vest absolutely and at once in such of his or her children, or the issue of such children as he or she may, by his or her last will and testament designate and appoint, and in such manner and upon such terms as he or she may legally impose; but in case such person dies intestate, then said one-eighth part of my said residuary estate, which had been held in trust as aforesaid

for and during the lifetime of such person, shall thereupon vest absolutely and at once in his or her children, him or her surviving, share and share alike, and the issue of his or her deceased children (such issue to take share and share alike the portion which would have been received by the parent by the terms hereof if living) to be paid to them at the times and in the proportions following, to wit: As each attains the age of twenty-one years, there shall be paid to him or her a sum not to exceed fifty thousand dollars ($50,000); as each attains the age of twenty-five years a further sum, not to exceed one hundred thousand dollars ($100,000); as each attains the age of thirty years the remainder, if any, of the share of said one-eighth part of my said residuary estate with all accumulations of interest, income and profits, to which he or she may be entitled; excepting, however, that said children, and said issue of deceased children, shall, each of them, receive from his or her respective share of said one-eighth part of my said residuary estate which is herein provided shall vest in such child, or said issue of a deceased child, the entire income from and after he or she shall have attained the age of twenty-one years, and during minority such sum or sums not to exceed five thousand
15 dollars ($5,000) in any one year as in the judgment and discretion of his or her guardian may seem right and proper for the maintenance, education and support of such child or said issue of a deceased child.

And in case any person, for and during whose lifetime the one-eighth party of my said residuary estate is held in trust, as aforesaid, dies without children, or the issue of his or her deceased children, him or her surviving, then, and in every such case said one-eighth party of my said residuary estate, with all accumulations of interest, income and profits, shall thereupon vest absolutely and at once, share and share alike in my wife, Margaret E. Dows, if she survives him or her and the brothers and sisters of such person, him or her surviving, and the children of his or her deceased brothers and sisters (such children to take share and share alike the portion which would have been received by the parent by the terms hereof if living) subject to the same provisions as to times, proportions of payment, maintenance, education and support as are hereinbefore provided in the case of the children and the issue of the deceased children of the person for and during whose lifetime said one-eighth part of my said residuary estate is herein directed to be held in trust."

Ninth:—The provisions made by me in this will for my wife shall be taken and accepted by her in lieu of and in full satisfaction for all claims to dower or thirds out of any real or personal estate of which I shall have been or shall be seized or possessed at the time of my death.

Tenth:—I hereby direct that in withdrawing any funds of my estate from any of the partnerships in which I may be interested at the time of my decease due regard be had to the convenience of the surviving partners and I hereby authorize and empower my executors hereinafter named (or such of them as may qualify) and
16 the survivors and survivor of them and the successors to their trust to exercise such regard at the risk of my said estate.

Eleventh:—I hereby nominate and appoint my friends Alexander E. Orr, Benjamin Brewster, my son David Dows, Jr., my sons-in-law Richard M. Hoe and George B. Cooksey, executors of this my last will and testament, and in case any of said persons fails to qualify or dies or resigns then I nominate and appoint in his place and stead my friend William A. Nash and I nominate and appoint my son Tracy Dows to be added when he shall attain the age of twenty-one years as an executor of this my last will and testament and I hereby direct that my said executors be not required to give any security for the performance of their duties and I give and grant to my said executors (or to such of them as may qualify) and to the survivors and survivor of them and the successors to their trust full power and authority in their discretion to sell any stocks or securities which I may hold at the time of my decease or to retain such thereof as they may consider to be a reasonable or safe investment or think it best for any reason to retain as a permanent investment; and full power and authority to do and perform any and all things which may be requisite or proper for the performance of their duties as executors or trustees under the provisions of this my will and I give and grant to such of my said executors as may qualify and to the survivors and survivor of them and the successors to their trust full power to grant, bargain, sell and convey my real estate or any part thereof for such price and on such terms, at public or private sale, as they shall deem best, with power until such sale to improve the same, to repair, build and rebuild and to lease the same upon such terms as they in their discretion may approve, but not for a period longer than twenty years. I further give and grant to my
17 said executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust full power and authority to invest and reinvest in their discretion in realty or otherwise my said estate and all accumulations arising from the rents, income and profits thereof, and to purchase, lease, grant, bargain, sell and convey real estate, and in general to manage my said estate subject to the restrictions in this my will contained, according to their best judgment and discretion. And I hereby direct that any of my real estate, save and accept such portions as are mentioned or described in the third and sixth paragraphs of this my will, may be sold and conveyed to pay any or all legacies or bequests in this my will contained.

I further authorize and empower my executors (or such of them as may qualify) and the survivors and survivor of them and the successors to their trust, whenever by the provisions of this my will, or otherwise, they may hold any real estate in common with any other person or persons, and in their opinion a partition thereof is necessary or advantageous, to make a partition and division of said real estate by deeds of conveyance or by action at law, or otherwise, as they in their discretion may approve.

I further authorize and direct that the act of any four of my said executors in respect to anything which by this my will they are empowered to do shall be as binding as if all my said executors (or

such of them as may qualify) or the survivors or survivor of them or the successors to their trust had united in said act.

And I further authorize and empower any of my said executors, or their successors, by power of attorney, duly executed and acknowledged according to the formalities requisite to entitle an instrument to record, to authorize any of their coexecutors or
18 trustees to do and perform all and every act or thing which they are authorized by the provisions of this my will to do or perform with the same force and effect as if the executor executing such power of attorney personally did and performed such act or thing.

And in case a majority of my said executors (or such of them as may qualify) or the survivors of them or the successors to their trust, assent thereto, such assent to be evidenced by their joining in the deed of conveyance or other instrument I hereby authorize and empower such majority to lease, sell or convey any of my real estate to any other of their coexecutors or cotrustees.

In witness whereof I have hereunto set my hand and seal at the city of New York this eleventh (11th) day of February, one thousand eight hundred and eighty-eight.

DAVID DOWS. [SEAL.]

The foregoing instrument consisting of twenty-three pages and twenty lines was, on the day of the date thereof signed, sealed, published and declared by the said testator as and for his last will and testament in our presence and we, thereupon, at his request, in his presence, and in the presence of each other did sign our names hereunto as subscribing witnesses.

JAS. R. COWING,
119 *State St., Brooklyn, N. Y.*
JAS. L. MITCHELL,
164 *Washington P'k, Brooklyn, N. Y.*
HORACE E. DEMING,
145 *W. 58th St., N. Y. City.*

EXHIBIT "B."

Third Paragraph of Will of David Dows, Jr.

"Whereas, by the sixth and eighth paragraphs of the will of my father, the late David Dows (which will was admitted to probate on the 14th day of April, 1890, by the surrogate of the city and
19 county of New York in the State of New York) I am given power to designate and appoint by will from among my children and their issue the person or persons in whom certain property or the proceeds of certain property mentioned and described in said sixth and eighth paragraphs of my father's will shall vest at my death now in pursuance and exercise of such power and powers I do hereby appoint, designate and direct as follows:

The said property subject to my appointment and the whole thereof shall vest upon my death in my three (3) children, David, Robert and Kenneth in the following manner, viz.:

(*a*) My son David shall have the use and income of three undivided forty-eighth parts thereof during the life of my son Robert and at the death of Robert or on Robert's reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*b*) My son David shall have the use and income of four other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*c*) My son David shall have the use and income of nine other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching thirty years of age (whichever event shall sooner happen) the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son Robert.

(*d*) My son Robert shall have the use and income of three
20 undivided forty-eighth parts thereof during his own life; and at his death or on his reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son Kenneth.

(*e*) My son Robert shall have the use and income of four other undivided forty-eighth parts thereof during his own life; and at his death or on his reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts thereof shall go in fee-simple and absolute ownership to my son Kenneth.

(*f*) My son Robert shall have the use and income of nine other undivided forty-eighth parts thereof during his own life; and at his death or on his reaching thirty years of age (whichever event shall sooner happen) the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son Kenneth.

(*g*) My son Kenneth shall have the use and income of three undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-one years of age (whichever event shall sooner happen) the principal of such three-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

(*h*) My son Kenneth shall have the use and income of four other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching twenty-five years of age (whichever event shall sooner happen) the principal of such four-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

(*i*) My son Kenneth shall have the use and income of nine
21 other undivided forty-eighth parts thereof during the life of my son Robert; and at the death of Robert or on Robert's reaching thirty years of age (whichever event shall sooner happen)

the principal of such nine-forty-eighth parts shall go in fee-simple and absolute ownership to my son David.

If my son Robert shall not be living at my death, then the life measuring the duration of the respective estates *pur autre vie* shall be that of my son Kenneth, and in such case the respective life estates in the three-forty-eighths, four-forty-eighths and the nine-forty-eighths shall terminate, and the respective remainders take effect upon Kenneth's death; or as to the three-forty-eighths, upon his reaching the age of twenty-three; and as to the four-forty-eighths, upon his reaching the age of twenty-seven, and as to the nine-forty-eighths, upon his reaching the age of thirty-two; instead of upon Robert's reaching twenty-one, twenty-five and thirty, respectively.

It is my meaning that each of my said three sons shall take an estate *pur autre vie* in one equal share of all the property over which my said father's will gives me the power of appointment, such life estate to be measured by the life of my son Robert, or if he is dead, by that of my son Kenneth, with the possibility of such life estate being shortened, as to certain specified portions thereof, by Robert's or Kenneth's (as the case may be) reaching certain specified ages; and that each shall take also a remainder in another equal share, to take effect in possession at the close of his life estate in the other share; but that each interest for life or remainder shall vest absolutely and at once upon my death, in legal and not equitable ownership, and without contingency.

If any of my said three children shall have died prior to my death leaving issue who shall be living at my death, such issue shall take, share and share alike, the portion and interests,
22 which, under this provision, would have gone to the parent if living.

If any one of my said three children shall have died prior to my death, without leaving issue who shall be living at my death, the portion and interests which such child would have taken under this provision, if living, shall go share and share alike to the survivors among such three children living at my death."

Order Appointing Appraiser.

At a surrogate's court, held in and for the county of New York, at the county court-house in the city of New York, on the 31st day of October, 1900.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

On reading and filing the petition of Bird S. Coler, comptroller of the city of New York, and Theodore P. Gilman, comptroller of the State of New York, verified October 31, 1900, I do hereby, pursuant to the requirement of chapter 658 of the Laws of 1900, direct Charles K. Lexow, Esq., one of the appraisers appointed by the

State comptroller under said statute, to fix the fair market value at the time of the transfer of the property which was of the above-named decedent and which is subject to the payment of any tax imposed by article X, chapter 908, Laws of 1896, and the acts amendatory thereof and supplemental thereto.

ABNER C. THOMAS, *Surrogate.*

23 *Report of Appraiser.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of DAVID DOWS, SENIOR, Deceased.

To the surrogate's court of the county of New York:

I, Charles K. Lexow, who was, by an order of Hon. Abner C. Thomas, one of the surrogates of the county of New York, made and entered on the 31st day of October, 1900, directed to act as appraiser, in pursuance of chaper 908 of the Laws of 1896, and the acts amendatory thereof and supplemental thereto, do respectfully report:

First. That forthwith after my said appointment, I duly took and subscribed the oath prescribed by statute, which said oath is hereunto annexed.

Second. That thereafter, on the 1st day of November, 1900, I duly gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property of said David Dows, Senior, deceased, subject to the payment of the tax imposed by said law, including those named by the surrogate in the said order, of the time and place at which I would appraise the property of said David Dows, Senior, deceased, subject to the payment of said tax;

24 a true copy of said notice, together with proof of mailing thereof, is also hereto attached:

Comptroller of the State of New York;
Comptroller of the city of New York;
Alexander E. Orr;
William A. Nash;
George B. Cooksey;
Richard M. Hoe;
Tracy Dows;
David Dows, 3rd;
Robert Dows;
Kenneth Dows.

Third. I further report that at the time and place in said notice stated, to wit: on the 8th day of November, 1900, at one o'clock in the afternoon, at room No. 1403, in the Home Life building, Nos. 256 and 257 Broadway, in the borough of Manhattan, city of New York, and at other and subsequent times and at divers places, I appraised all the property, being wholly personal, of said David Dows, Senior, deceased, subject to the payment of the said tax, at its fair market value at the date of the death of said David Dows, Jr., de-

ceased, to wit: on or about the 13th day of January, 1899, as follows:

Value of property in statement "A"	$1,677,356.73
Value of property in statement "B"	827,751.19
Total	$2,505,107.92

That the value of $\frac{3}{8}$ths is	$156,569.24
That the value of $\frac{4}{8}$ths is	208,758.99
That the value of $\frac{9}{8}$ths is	469,707.74

25 Fourth. I further report that statement "A," attached hereto and made a part hereof, contains an accurate and complete schedule of all the property held by the trustees of said David Dows, Senior, on said 13th day of January, 1899, under the sixth paragraph of said will of David Dows, Senior, together with its fair market value on said date.

Statement "B," hereto attached and made a part hereof, contains an accurate and complete schedule of all the property of said David Dows, Senior, mentioned and referred to in the eighth paragraph of the will of David Dows, Senior, held by the trustees of the said David Dows, Senior, on said 13th day of January, 1899, under the eighth paragraph of said will of David Dows, Senior, except certain specific pieces of real estate held by said trustees together with its fair market value on said 13th day of January, 1899.

I further report that the value of one-eighth of said property on said 13th day of January, 1899, is the sum of $827,751.19.

Fifth. I further report that said David Dows, Senior, died on the 30th day of March, 1890, and his will was admitted to probate in the surrogate's court of New York county on the 14th day of April, 1890; a true copy of his will is annexed to the petition herein.

I further report that David Dows, Junior, died on the 13th day of January, 1899, and his will was admitted to probate in the surrogate's court of Westchester county on the 11th day of February, 1899; a true copy of the third paragraph of said will is annexed to the petition herein.

David Dows, Third, Robert Dows and Kenneth Dows were the only children of said David Dows, Junior, living at the death of their grandfather, said David Dows, Senior. No children were born to said David Dows, Jr., after the death of the said David
26 Dows, Senior, and said David Dows, 3d, Robert Dows and Kenneth Dows were living on January 13th, 1899, at the death of their father, David Dows, Jr.

Said David Dows, 3d, was born August 12th, 1885; said Robert Dows was born December 28th, 1886, and said Kenneth Dows was born September 7th, 1889.

The Dows and Columbia stores, mentioned in the sixth paragraph of said will of David Dows, Senior, a true copy of which will is annexed to the petition herein, *was*, at the time of his death, real estate, and *was* the only property passing under said sixth paragraph, and the interest of said David Dows, Senior, in certain real

estate known as the Fulton stores, which *was* included in the property passing under the eighth paragraph of said will, *were*, in or about the year 1895, sold to the Brooklyn Wharf & Warehouse Company, a corporation duly organized under the laws of the State of New York. The proceeds of the sales of said Dows and Columbia stores were invested in the property contained in statement "A," hereinbefore mentioned.

Said interest in said Fulton stores was sold for $450,187.50, which sum was invested in, and forms a part of, the property contained in statement "B," hereinbefore mentioned.

In addition to said Fulton stores, said David Dows, Senior, owned certain real estate known as the Brooklyn Avenue property, which was included in the property passing under the eighth paragraph of his said will. Said Brooklyn Avenue property was sold, in or about the year 1893, for $67,500.00, which sum was invested in, and forms a part of, the property contained in statement "B," hereinafter mentioned. Each of said statements, "A" and "B," contains the true and fair value on the 13th day of January, 1899, of the property scheduled therein.

27 Sixth. I further report that all the persons mentioned as parties hereto are of sound mind and full age, except David Dows, 3d, Robert Dows and Kenneth Dows, infants, who appear herein by Richard M. Hoe and Tracy Dows, their general guardians, appointed as such on the 8th day of April, 1899, by the surrogate of Westchester county, of the State of New York, by letters of guardianship duly issued to them on said date.

Seventh. I further report that the following appearances were made before me in this proceeding:

The Comptroller of the State of New York, and the Comptroller of the City of New York, by Joseph W. Middlebrook, Esq., their attorney;

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as trustees and executors of the last will and testament of David Dows, Jr., deceased;

Tracy Dows and Richard M. Hoe, as executors of the last will and testament of David Dows, Junior, deceased, Tracy Dows and Richard M. Hoe, as guardians of David Dows, 3d, Robert Dows and Kenneth Dows,

By Horace E. Deming, their attorney.

Eighth. I further report that there were filed with me the objections hereto annexed, and that I have overruled each of said objections (*post*, pp. 34–39).

Ninth. I further report that included in the property contained in said statement "B" are 50 State of New York canal-improvement bonds, due January 12th, 1912; interest, 3 per cent., par value, $50,000, market value, $51,635. Said bonds were issued on September 4th, 1897, pursuant to chapter 79 of the Laws of 1895. I have held that they are taxable in this proceeding.

Also included in said statement "B" are 100 consolidated stock of the city of New York, due 1922; interest 3½ per cent., par value

$100,000.00, market value $109,380.00. These bonds were
28 issued November 12th, 1896, for the redemption of bonds and stock of the city of New York, maturing in the year 1896. I have held that they are taxable in this proceeding; my ruling in each case being based upon the theory that the tax is a tax upon transfer and not upon property.

Tenth. I further report that no deductions have been made for debts, expenses or commissions, none having been claimed.

Eleventh. I further report that in compliance with the request of the surrogate hereto annexed, the insurance department of the State of New York has furnished its certificate of the values of the various estates, and of the remainders, which certificate is hereunto annexed and made a part of this report.

All the property mentioned in the sixth paragraph of the will of David Dows, Senior, and one-eighth of all the property mentioned in the eighth paragraph of said will, was given to trustees to pay the income thereof during the life of David Dows, Jr., and said David Dows, Jr., was given power to *appoint* said property by will among his children. He exercised the power as follows:

(*a.*)

His son David Dows, Third, is given the use and income of three undivided forty-eighth parts of said property during the life of Robert Dows (brother of said David Dows, Third) and at the death of Robert, or on Robert's reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighth parts is given in absolute ownership to Robert.

The value of the $\frac{3}{48}$ths I find to be..... $156,569.24
The value of the life interest I find to be... $52,624.00
The value of the remainder I find to be ... 89,923.00

29 (*b.*)

Similarly, David is given the use and income of four undivided forty-eighths of such property during the life of Robert; and at the death of Robert, or on Robert's reaching twenty-five years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to Robert.

The value of the $\frac{4}{48}$ths I find to be..... $208,758.99
The value of the life interest I find to be... $90,706.00
The value of the remainder I find to be..... 93,201.00

(*c.*)

Similarly, said David is given the use and income of nine undivided forty-eighths of such property during the life of Robert; and at the death of Robert, or on Robert's reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to Robert.

The value of the $\frac{9}{48}$ths I find to be..... $469,707.74
The value of the life interest I find to be.. $247,435.00
The value of the remainder I find to be... 150,902.00

(*d.*)

Similarly, said Robert is to have the use and income of three undivided forty-eighths of such property during his own life, and at his death, or on his reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighths is given, in absolute ownership, to Kenneth Dows (brother of
30 David Dows, Third).

The value of the $\frac{3}{48}$ths I find to be..... $156,569.24
The value of the life interest I find to be... $54,142.00
The value of the remainder I find to be..... 95,347.00

(*e.*)

Similarly, said Robert is to have the use and income of four undivided forty-eighths of such property during his own life, and at his death, or on his reaching twenty-five years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to said Kenneth.

The value of the $\frac{4}{48}$ths I find to be..... $208,758.99
The value of the life interest I find to be... 94,352.00
The value of the remainder I find to be..... 101,670.00

(*f.*)

Similarly, said Robert is to have the use and income of nine undivided forty-eighths of such property during his own life, and at his death, or on his reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to said Kenneth.

The value of the $\frac{9}{48}$ths I find to be..... $469,707.74
The value of the life interest I find to be.. $260,721.00
The value of the remainder I find to be... 172,059.00

(*g.*)

Similarly, said Kenneth is to have the use and income of three undivided forty-eighths of such property during the life of
31 said Robert; and at the death of Robert, or on Robert's reaching twenty-one years of age (whichever event should sooner happen), the principal of such three-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{3}{48}$ths I find to be $156,569.24
The value of the life interest I find to be... $52,873.00
The value of the remainder I find to be ... 90,704.00

(*h.*)

Similarly, the said Kenneth is to have the use and income of four undivided forty-eighths of such property during the life of said Robert; and at the death of Robert, or on Robert's reaching twenty-five

years of age (whichever event should sooner happen), the principal of such four-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{4}{48}$ths I find to be	$208,758.99
The value of the life interest I find to be.. $91,220.00	
The value of the remainder I find to be ... 94,054.00	

(*i.*)

Similarly, the said Kenneth is to have the use and income of nine undivided forty-eighths of such property during the life of said Robert; and at the death of Robert, or on Robert's reaching thirty years of age (whichever event should sooner happen), the principal of such nine-forty-eighths is given, in absolute ownership, to said David.

The value of the $\frac{9}{48}$ths I find to be	$469,707.74
The value of the life interest I find to be. $249,128.00	
The value of the remainder I find to be.. 153,505.00	

32 Twelfth. I therefore appraise the values of the legacies to said David Dows, Third; Robert Dows, and Kenneth Dows, who are each grandchildren of David Dows, Senior (the donor of the power of appointment), and children of David Dows, Junior (the donee of the power of appointment), as determined by the eleventh paragraph of this report, as follows:

David Dows, Third:

Value of life estate, sub. (*a*).....	$52,624.00	
Value of life estate, sub. (*b*).....	90,706.00	
Value of life estate, sub. (*c*).....	247,435.00	
		$390,765.00
Value of remainder, sub. (*g*).....	90,704.00	
Value of remainder, sub. (*h*).....	94,054.00	
Value of remainder, sub. (*i*).....	153,505.00	
		338,263.00
		$729,028.00

Robert Dows:

Value of life estate, sub. (*d*).....	$54,142.00	
Value of life estate, sub. (*e*).....	94,352.00	
Value of life estate, sub. (*f*).....	260,721.00	
		$409,215.00
33 Value of remainder, sub. (*a*).....	89,923.00	
Value of remainder, sub. (*b*).....	93,201.00	
Value of remainder, sub. (*c*).....	150,902.00	
		334,026.00
		$743,241.00

Kenneth Dows:

Value of life estate, sub. (*g*)	$52,873.00	
Value of life estate, sub. (*h*)	91,220.00	
Value of life estate, sub. (*i*)	249,128.00	
		393,221.00
Value of remainder, sub. (*d*)	95,347.00	
Value of remainder, sub. (*e*)	101,670.00	
Value of remainder, sub. (*f*)	172,059.00	
		369,076.00
		$762,297.00

All of which is respectfully submitted.
Dated New York, January 31, 1901.

CHARLES K. LEXOW, *Appraiser.*

34 *Objections Filed with Appraiser.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, present the following objections to the proceedings herein and the appraisal thereunder:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when
35 made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby be-

coming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows, Sr. had the undoubted legal right to transfer by will, his property or any interest therein to his grandchildren, David Dows, 3d, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death in 1890, his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows'
36 grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing a transfer what is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law be declared valid the various remainders vesting in David Dows, 3d, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

37 Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty is determined by its form at the death of the persons from whom the property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores, comprising the entire property held by the trustees under the sixth paragraph of the will of David Dows, Sr., and the Fulton stores and the Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which appear in statement A attached to the affidavit of Richard M. Hoe and Tracy Dows (verified the 30th day of November, 1900).

The said Fulton stores were sold in or about the year 1895 for $450,187.50 and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500.

Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate and are included in
38 statement B attached to said affidavit of Richard M. Hoe and Tracy Dows. The property scheduled in said statement A and $517,687.50 of the property included in said statement B are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision five of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks in the list hereto annexed marked "A" (fol. 118–122), the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897, amending subdivision 6 of section 4 of the tax law, the following property scheduled in statement B attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900, is exempt from taxation:

50 State of New York Canal improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value,

$51,635, issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporations law (chap. 685 of the Laws of 1892).

3. The following property, scheduled in statement B, attached to the affidavit of Richard M. Hoe and Tracy Dows, verified Novem- 30th, 1900:

39 50 State of New York Canal improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635. Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895;

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York, maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Dated New York, November 8, 1900.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al.

40 "A."

List of Stocks Referred to in Objection IV, the Same Being Stocks in Incorporated Companies Liable to Taxation on Their Capital.

No. shares.	Company.	Par value.	Appr's'd val.
200	Chicago and Northwestern preferred stock....	20,000	37,400.00
3,064	Delaware and Hudson Canal Co. stock.....	306,400	341,636.00
2,527	Chicago, Rock Island and Pacific stock.....	252,700	289,973.25
400	Missouri Pacific stock.....	40,000	18,250.00
1,000	Chicago, St. Paul, Minneapolis and Omaha preferred stock.....	100,000	167,000.00
500	Canada Southern stock..	50,000	27,500.00
700	Union Pacific preferred stock.....	70,000	51,800.00
1,000	Union Pacific common stock.....	100,000	45,125.00
1,543	Chicago and Eastern Illinois preferred stock	154,300	175,902.00
240	Rome, Watertown and Ogdensburg stock.....	24,000	30,720.00
218	New York, New Haven and Hartford stock...	21,800	43,436.50
50	Merchants' National (of New York) Bank stock.....	2,500	3,850.00
300	Ontario Silver Mining Co. stock.....	30,000	1,800.00
1,343	Kingston and Pembroke Iron Mining Co. stock.	33,575	53.72
400	Federal Steel preferred stock	40,000	33,200.00
150	Peoria and Bureau Valley Railroad stock.....	15,000	27,300.00
70	Rock Island and Peoria stock.....	7,000	7,000.00
186	Central Ohio stock.....	9,300	3,999.00
8	New York and South Brooklyn Ferry and Steam Navigation Co. stock.....	800	208.00
434	Big Muddy Coal and Iron Co. preferred stock.	43,400	1,085.00
322	Central Park, North and East River stock....	32,200	57,960 00
400	Erie and Pittsburgh stock.....	20,000	27,600.00
1,000	Pittsburgh, McKeesport and Youghiogheny stock.....	50,000	68,500 00
500	Union National (of Chicago) Bank stock.....	50,000	60,000.00
41			
100	Central Trust Company stock....	10,000	180,000.00
300	Standard Oil Trust certificates	30,000	134,250.00
12	Consolidated Elevator Co., Duluth, first preferred stock.....	1,200	1,200.00
12	Consolidated Elevator Co., Duluth, second preferred stock.....	1,200	1,080.00
24	Consolidated Elevator Co., Duluth, common stock.....	2,400	600.00
46	Natural Gas Trust certificates.....	4,600	9,200.00
1	Clinton Hall Association certificate.....	50	25.00
50	Improved Dwelling Association stock	5,000	4,750.00

42 *Order Assessing Tax.*

At a surrogate's court, held in and for the county of New York, at the county court-house in the city of New York, on the 15th day of February, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

On reading the report of Charles K. Lexow, Esq., the appraiser, filed herein on the 8th day of February, 1901, and on motion of Joseph W. Middlebrook, attorney for the petitioners herein, it

Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act relating to taxable transfers, and the tax to which the said transfers are liable, is as follows:

Beneficiary.	Cash value of interest.	Tax assessed thereon.	
David Dows, 3d	$52,624.00	$526.24	
" "	90,706.00	907.06	
" "	247,435.00	2,474.35	
" "	90,704.00	907.04	
" "	94,054.00	940.54	
" "	153,505.00	1,535.05	
			$7,290.28
43			
Robert Dows	54,142.00	541.42	
" "	94,352.00	943.52	
" "	260,721.00	2,607.21	
" "	89,923.00	899.23	
" "	93,201.00	932.01	
" "	150,902.00	1,509.02	
			$7,432.41
Kenneth Dows	52,873.00	528.73	
" "	91,220.00	912.20	
" "	249,128.00	2,491.28	
" "	95,347.00	953.47	
" "	101,670.00	1,016.70	
" "	172,059.00	1,720.59	
			$7,622.97

ABNER C. THOMAS, *Surrogate.*

44 *Notice of Appeal to Surrogate.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, appeal to the surrogate of New York county from the report of the appraiser herein filed on the 8th day of February, 1901, and from the order entered herein on the 15th day of February, 1901, and from each and every part of said order, and hereby state the following as the grounds of their appeal:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

45 "5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provision of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows,

Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren David Dows, 3rd, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his
46 death in 1890, his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing a transfer what is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law
47 be declared valid, the various remainders vesting in David Dows, 3rd, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section I of the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty, is determined by its form at the death of the person from whom the

property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores comprising the entire property held by the trustees under the sixth paragraph of the will of David Dows, Sr., and the Fulton stores and Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which appear in statement A annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows (verified the 30th day of November, 1900).

The said Fulton stores were sold in or about the year 1895 for $450,187.50 and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500.

48 Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate, and are included in statement B annexed to the report of the appraiser herein and attached to said affidavit of Richard M. Hoe and Tracy Dows. The property scheduled in said statement A and $517,687.50 of the property included in said statement B are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision 5 of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks marked with an asterisk in the last column of statements A and B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified the 30th day of November, 1900 (*ante*, fols. 118–122) the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897 amending subdivision 6 of section 4 of the tax law the following property scheduled in statement B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900, is exempt from taxation.

50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635, issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

49 Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporation law (chap. 685 of the Laws of 1892).

3. The following property scheduled in statement B annexed to the report of the appraiser herein and attached to the affidavit of Richard M. Hoe and Tracy Dows, verified November 30th, 1900:

50 State of New York, canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635.

Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Upon this proceeding it is intended to draw in question the validity of all the provisions of said statute which purport to enforce a tax upon the whole or any part of the property herein, and it is intended to draw into question the authority and jurisdiction exercised thereunder by the surrogate and the appraiser upon the grounds that such provisions are repugnant to the Constitution of the United States as hereinabove set forth. The appellants specially set up and claim a title, right, privilege and immunity under section 1 of the fourteenth article of amendment of the Constitution of the United States and section 10 of article 1 of said Constitu-
50 tion, as aforesaid, which title, right, privilege and immunity is violated and destroyed by the provisions of said statute.

Dated, New York, February 19, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–13 *William Street, Borough of Manhattan,*
City of New York.

To the surrogate of New York county, the clerk of the surrogate's court, New York county; Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the city of New York.

51 *Order of Surrogate from which Appeal is Taken.*

At chambers of the surrogate's court held in and for the county of New York, at the county court-house in the county of New York, on the 6th day of March, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last

will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, having appealed from the report of the appraiser herein filed on the 8th day of February, 1901, and from the order confirming said report and fixing and assessing the transfer tax herein entered and filed on the 15th day of February, 1901, and said appeal having come on to be heard—

Now, after hearing Horace E. Deming, Esq., attorney for appellants, in support of said appeal and Joseph W. Middlebrook, Esq., attorney for respondents, in opposition thereto, it is—

Ordered, adjudged and decreed, that said report and order
52 so appealed from be and they hereby are affirmed and that the date when the transfers now taxed were effected was January 13, 1899, that date being fixed because it was the date of the death of David Dows, Jr., the donee of the power contained in the will of David Dows, Sr.

ABNER C. THOMAS, *Surrogate.*

Notice of Appeal to Appellate Division (Executors).

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., appearing by Horace E. Deming, Esq., their attorney, appeal to the appellate division, first department, of the supreme court of the State of New York, from the order of affirmance of the surrogate made and entered herein on the 6th day of March, 1901, and from each and every part of said order; and the appellants hereby give notice that they intend to bring up for review on such appeal the order of the surrogate herein dated
53 the 15th day of February, 1901, fixing and assessing the tax, and each and every part of said order.

Dated New York, March 12th, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–'3 *William Street, Borough of Manhattan,*
City of New York.

To Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York; J. Fairfax McLaughlin, Esq., clerk of the surrogate's court.

54 *Notice of Appeal to Appellate Division (Guardians).*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Please take notice that Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, and Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E Deming, Esq., their attorney, appeal to the appellate division, first department, of the supreme court of the State of New York, from the order of affirmance of the surrogate made and entered herein on the 6th day of March, 1901, and from each and every part of said order; and the appellants hereby give notice that they intend to bring up for review on such appeal the order of the surrogate herein, dated the 15th day of February, 1901, fixing and assessing the tax, and each and every part of said order.

Dated New York, March 12th, 1901.

HORACE E. DEMING,
Attorney for Richard M. Hoe and Tracy Dows, Appellants, 11–3 *William Street, Borough of Manhattan, City of New York.*

To Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York; J. Fairfax McLaughlin, Esq., clerk of the surrogate's court.

55 *Affidavit of No Opinion.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

STATE OF NEW YORK, *County of New York,* } ss.:

Horace E. Deming, being duly sworn, says:

I am the attorney for the appellants and am familiar with all the proceedings that have been had herein.

No opinion was given or filed by the surrogate.

HORACE E. DEMING.

Sworn to before me this 12th day of March, 1901.

JULIUS HENRY COHEN,
Notary Public # 53, *N. Y. Co.*

56 *Certification.*

STATE OF NEW YORK, } ss:
County of New York, }

I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that I have compared the foregoing copy of the notices of appeal, papers, order and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased, with the originals, in this office, and have found the same to be true and correct copies of such originals, and the originals thereof are all the papers upon which said order and decree was made.

In testimony whereof, I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this 12th day of March, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

57 *Order of Affirmance by Appellate Division.*

At a stated term of the appellate division of the supreme court in the State of New York, in the first department, held at the court-house, in the county of New York, on the 22d day of March, 1901.

Present: Hon Charles H. Van Brunt, P. J.;
" William Rumsey,
" Edward Patterson,
" Chester B. McLaughlin, JJ.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, having respectively duly appealed to the appellate division of the supreme court of the State of New York, in the first department, from the order made in the above-entitled proceeding by the surrogate of
58 the county of New York dated and filed herein the 6th day of March, 1901, which order affirmed an order of the surrogate made and entered on the 15th day of February, 1901, confirming the report of the tax appraiser and assessing the tax herein, and said appeal having regularly come on to be heard,

Now after hearing Horace E. Deming, Esq., of counsel for the appellants, and Jabish Holmes, Jr., Esq., of counsel for the Comp-

troller of the City of New York, respondent, it is on motion of Joseph W. Middlebrook, Esq., attorney for respondent,

Ordered, adjudged and decreed that said order of the surrogate appealed from be, and the same hereby is affirmed, with costs to the respondent against the appellants.

59 Appellate Division of the Supreme Court, State of New York, First Judicial Department.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR.

CLERK'S OFFICE, NEW YORK COUNTY.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court, in the first judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding, and entered in my office on the 28th day of March, 1901, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of New York, this 28th day of March, 1901.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

60 *Notice of Appeal to Court of Appeals.*

Surrogate's Court, New York County.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, JR., Deceased.

Please take notice that Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3d, Robert Dows and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, appearing by Horace E. Deming, Esq., their attorney, each respectively appeals to the court of appeals from the order entered in this proceeding in the office of the clerk of the appellate division, first department, on the 28th day of March, 1901, a certified copy of which said order was entered and filed in the office of the clerk of the surrogate's court of the county of New York on the 29th day of March, 1901, by which was affirmed the order of the surrogate of said county of New York, filed and entered herein on the 6th day of March, 1901, by which was affirmed the report of the appraiser herein filed on the 8th day of February, 1901, and the order
61 of the surrogate entered thereon, fixing and assessing the tax, entered in said office of the clerk of said surrogate's court on

the 15th day of February, 1901, and said appellants appeal from each and every part of said order, and hereby state the following as the grounds of their appeal:

I.

The alleged basis for this proceeding is subdivision 5 of section 220 of article X (entitled taxable transfers) of the tax law of the State of New York (chapter 908, Laws 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision 5 of section 220 as amended is unconstitutional, null and void under section 1 of the fourteenth amendment
62 to the Constitution of the United States in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death in 1890, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3d, Robert Dows and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death in 1890 his said grandchildren acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks, in 1899, to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property, the full right to which had vested in them many years before.

It is, therefore, unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be a power

of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

63 4. This amendment imposes an unequal, arbitrary and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground but is a mere arbitrary selection.

5. This amendment attempts by arbitrary definition to change the character of a thing by merely changing its name and by pronouncing that a transfer which is not a transfer to take away the vested property rights of citizens.

II.

Even if subdivision 5 of section 220 of the transfer tax law be declared valid, the various remainders vesting in David Dows, 3d, Robert Dows and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property.

Any construction of the transfer tax act which makes such remainders now taxable is in conflict with section I of the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law and denies to such citizens the equal protection of the laws.

III.

Under article X of the tax law of the State of New York the transfer of real estate to lineal descendants is exempt from taxation; and the question whether property is real estate or personalty is determined by its form at the death of the person from whom the property comes. In the present case David Dows, Sr., is that person. At his death in 1890 the Dows and Columbia stores comprising the entire property held by the trustees under the sixth paragraph of

64 the will of David Dows, Sr., and the Fulton stores and Brooklyn Avenue property contained in the property held by the trustees under the eighth paragraph of said will were real estate. The said Dows and Columbia stores were sold in or about the year 1895 and the proceeds thereafter invested in the various securities which the trustees under said sixth paragraph held on the 13th day of January, 1899, in place of said real estate and which were included by the appraiser in his report (fols. 77, 73).

The said Fulton stores were sold in or about the year 1895 for $450,187.50, and the said Brooklyn Avenue property was sold in or about the year 1893 for $67,500 (fols. 77–'8).

Both of said sums were invested in securities which the trustees under the said eighth paragraph held on the said 13th day of January, 1899, in place of said real estate, and are included in the report of the appraiser herein. The property so reported as property

held under said eighth paragraph and $517,687.50 of the property so reported as property held under said sixth paragraph are, therefore, not taxable in this proceeding.

IV.

The tax under said subdivision 5 of section 220 of the tax law is a tax upon property.

1. Under subdivision 16 of section 4 of said tax law all the stocks set forth in the appeal papers at fols. 118–122, the same being stocks in incorporated companies liable to taxation on their capital, are exempt from taxation.

2. Under chapter 80 of Laws of 1897 amending subdivision 6 of section 4 of the tax law the following property included in the report of the appraiser herein (fols. 81–'2) is exempt from taxation:

65 50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635. Issued September 4th, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value. $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896.

Said last-mentioned property is also exempt from taxation under the provisions of section 7, the municipal corporation law (chap 685 of the Laws of 1892).

3. The following property included in the report of the appraiser herein:

50 State of New York canal-improvement bonds, due January 12, 1912. Interest, 3 per cent. Par value, $50,000. Market value, $51,635.

Issued September 4, 1897, pursuant to chapter 79 of the Laws of 1895.

100 consolidated stock of the city of New York, due 1922. Interest, 3½ per cent. Par value, $100,000. Market value, $109,380. Issued November 12, 1896, for the redemption of bonds and stock of the city of New York maturing in the year 1896,

is not taxable in this proceeding. Section 10 of article 1 of the Constitution of the United States forbids any State to pass any law impairing the obligation of contracts; and to tax said bonds or any part thereof would impair the obligation of the contracts under which said bonds were purchased.

Upon this appeal it is intended to draw in question the validity of all the provisions of said statute which purport to enforce a tax upon the whole or any part of the property herein, and it is
66 intended to draw into question the authority and jurisdiction exercised thereunder by the surrogate and the appraiser upon the grounds that such provisions are repugnant to the Constitution of the United States as hereinabove set forth. The appellants specially set up and claim a title, right, privilege and immu-

nity under section 1 of the fourteenth article of amendment of the Constitution of the United States and section 10 of article 1 of said Constitution, as aforesaid, which title, right, privilege and immunity is violated and destroyed by the provisions of said statute.

And they hereby give notice that they intend to bring up for review on such appeal the order of said surrogate herein dated the 15th day of February, 1901, fixing and assessing the tax and each and every part of said order.

Dated New York, March 29, 1901.

HORACE E. DEMING,
Attorney for Alexander E. Orr et al., Appellants,
11–13 *William Street, Borough of Manhattan,*
City of New York.

To the clerk of the surrogate's court, New York county; Joseph W. Middlebrook, Esq., attorney for Comptroller of the State of New York and Comptroller of the City of New York.

67 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, First Department.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

STATE OF NEW YORK, }
County of New York, } ss.:

Horace E. Deming, being duly sworn, says:

I am the attorney for the appellants and am familiar with all the proceedings that have been had herein.

No opinion was given or filed herein by the appellate division. The order of the surrogate was affirmed upon the opinion in the matter of Vanderbilt, 50 App. Div., 246; affirmed by the court of appeals on opinion of the appellate division in 163 N. Y., 597.

HORACE E. DEMING.

Sworn to before me this 2d day of April, 1901.

JULIUS HENRY COHEN,
Notary Public, # 53, *N. Y. Co.*

68 STATE OF NEW YORK, }
County of New York, } ss.:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the order of affirmance by the appellate division and the notice of appeal to the court of appeals, together with the notices of appeal to the appellate division, papers, order, and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased, with the originals thereof in this office, and have found the same to be true and correct copies of such originals, and the same, with the

originals thereof, are all the papers upon which said order and decree was made.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of the surrogate's court of the county of New York this 2nd day of April, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

(10c. stamp cancelled.)

69 *Opinion of the Appellate Division in Matter of Vanderbilt*, 50 *App. Div.*, 246; *Affirmed by the Court of Appeals on the Opinion of the Appellate Division in* 163 *N. Y.*, 597.

Supreme Court, Appellate Division, First Department, March, 1900.

Charles H. Van Brunt, P. J.; Edward Patterson, Morgan J. O'Brien, George L. Ingraham, Chester B. McLaughlin, JJ.

In the Matter of the Appraisal of the Estate of WILLIAM H. VANDERBILT, Deceased. Apr. 10, 1900. No. 2052.

Appeal from order of the surrogate denying motion to have it adjudged that a certain trust fund was not liable to transfer tax.

Mr. Henry B. Anderson, for appellant; Mr. Jabish Holmes, Jr., for respondent.

PATTERSON, *J.*:

The single question arising on this appeal may be stated as follows: Is the right of succession to the trust fund created by the will of William H. Vanderbilt and as to which a power of appointment was given to the testator's son Cornelius Vanderbilt, subject to the imposition of a transfer tax under the provisions of chapter
70 284 of the Laws of 1897? The question arises upon the following facts:

William H. Vanderbilt died in 1885, and his will was admitted to probate in the month of December of that year. The trust fund involved in this proceeding was established in favor of his son Cornelius, who was to enjoy the income for life. The testator directed that upon the death of Cornelius the fund should be paid to his lawful issue in such shares or proportions as Cornelius might by his last will have directed or appointed, and in default of such appointment the gift is made directly to the issue with an alternative disposition on failure of such issue. Cornelius Vanderbilt died in 1899, leaving a last will and testament, which was duly admitted to probate, and in and by which he exercised the power given by the will of his father, by appointing a certain specified portion of the fund to one of his sons and directing that the balance be equally divided among his other children. At the time of the death of William H. Vanderbilt, this fund, or the right of succession to it, was

not taxable under the collateral inheritance tax law. The trustees of the fund held and administered it until the death of Cornelius Vanderbilt. In 1897, an amendment of subdivision 5 of section 220 of the tax law was passed, which provides, that whenever any person shall exercise a power of appointment derived from any disposition of property made either before or after the passage of the amendment, such appointment when made shall be deemed a transfer, taxable under the provisions of the act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will. In December, 1899, a trustee of the fund under the will of William H. Vanderbilt, presented a petition to the surrogate setting forth the creation of the trust fund (with other trusts of a
71 similar character for the benefit of other persons) and that through proceedings taken in 1887, to assess and determine the tax upon legacies made under the will of William H. Vanderbilt, it was in effect determined that the fund herein referred to was not subject to any transfer or inheritance tax. The petition sets forth the exercise of the power of appointment by Cornelius Vanderbilt and the names of his children, and that the comptroller of the city of New York claims that the fund or some portion of it may be subject to the payment of a tax by reason of the provisions of chapter 284 of the Laws of 1897, and he prays that it be adjudged by the surrogate that neither said fund nor any part thereof is liable to any such tax by reason of any of the said provisions or otherwise. This petition is in the nature of an application to the surrogate to determine the subject of taxation as applicable to this trust fund, and the matter was submitted in that aspect upon a stipulation as to agreed facts. The surrogate decided and decreed that the fund is subject to a transfer tax of one per cent. under and pursuant to chapter 284 of the Laws of 1897, and that proceedings to assess the same must be had accordingly, and further ordered and decreed that the motion to declare the fund exempt from taxation be in all respects denied.

On the argument of this appeal and in the briefs submitted by counsel, many subjects were discussed in an interesting and instructive manner, but the practical question presented for determination relates to the authority to impose a tax upon the succession to this trust fund, as that fund is at present situated. The provisions of the amendment of 1897, covers directly and in terms the present case. The fund, or the right of succession to the fund, has never, as matter of fact, been taxed, and we think the power to impose a tax was not exhausted by the proceedings in the surrogate's court for the
72 imposition of a tax directly connected with the general estate of William H. Vanderbilt. The real ground upon which the contention of the appellant is made here, is that the execution by Cornelius Vanderbilt of the power of appointment related back to the will of his father, which gave him that power, and that, therefore, everything connected with and every interest affected by the exercise of that power is to be regarded as coming under the ad-

ministration of William H. Vanderbilt's estate and must be controlled by the law in operation at the time of the probate of William H. Vanderbilt's will. Or to state the point as made by the learned counsel for the appellant, that every right of inheritance with respect to the fund passed and became complete before the passage of the amendment of 1897, and no right of inheritance came into existence by the exercise of the power in the will of Cornelius Vanderbilt, and there is nothing in respect to this fund for the amendment of 1897 to operate upon.

The rule respecting the relation back of the appointment to the original will giving the power to appoint has been applied in cases under the collateral inheritance tax law and under the transfer tax act. Matter of Harbeck (161 N. Y., 211). In that case, it appeared that a testator, whose will went into effect in 1878, long before the enactment of the transfer tax law, gave a power of appointment over a certain fund to his widow, which power was exercised by her in 1896. It was held that the source of the title of the appointees to the fund was the original will of Harbeck, and that the names of the appointees, although designated by a later instrument, must be read into the original will; from which it followed that there being no law in existence, at the time the original will was proven, imposing a tax on the succession to the fund, that right was
73 exempt from taxation. In that case, the court states three propositions as being settled: First, that the tax sought to be imposed is not a tax upon property but upon the right of succession. Second, that the transfer tax act (as it then stood), had no retroactive effect, and, third, that the beneficiaries whose succession is sought to be taxed took by virtue of the will of Harbeck. But in the same case it is stated that the question of the retroactive effect of the transfer tax law, in a case like this, has ceased to be of any special public importance, in consequence of the enactment of the amendment of 1897 of section 220 of the transfer tax law. While this may not be construed as a judicial declaration that the legislation embodied in the amendment is to be given full retroactive effect, it is a strong intimation in that direction.

Scrutinizing the text of the amendment of 1897, it appears that the direct object of that legislation was to make the time at which the appointees would become entitled in possession the time at which the tax upon the right of succession should be imposed. Furthermore, the act constituting the transfer is declared to be the exercise of the power of appointment. It is argued by the learned counsel for the appellant that this legislation is ineffective because it impairs contract obligations, interferes with vested rights of the children of Cornelius Vanderbilt and deprives them (to the extent of the tax) of property without due process of law.

As affecting contract obligations, the argument of the learned counsel proceeds upon the theory that when the will of William H. Vanderbilt was proved and a tax was paid under the law as it then existed upon the rights of inheritance under that will, no power remained in the State to impose any further tax upon anything which

passed under Mr. William H. Vanderbilt's will, or upon any
74 right of succession acquired by any one under that will.
The argument seems to be that when the collateral inheritance tax law of 1885 was passed it constituted a contract between the State of New York and William H. Vanderbilt that his estate, provided he should die while that law was in full operation and unchanged, might be disposed of by him without the imposition of any further or other tax upon any rights or interests acquired under that will. We cannot assent to that proposition. As was remarked by Judge Earle, in the case of The People *ex rel.* Gallatin Nat. Bank *v.* Comm'rs of Taxes, etc. (67 N. Y., 519), "It is never to be assumed that the State has by any act fettered its power of taxation in the future, unless it appears with irresistible clearness that the enactment was intended to be in the nature of a private contract as distinguished from a mere act of general legislation (People *v.* Roper, 35 N. Y., 629; People *v.* Comm'rs, etc., 47 N. Y., 501; Rector of Christ Church *v.* Philadelphia, 24 How., U. S., 300)." We do not find in the original act of 1885 anything which authorizes the legal conclusion that the provisions of that act are in their nature different from the ordinary features distinctively belonging to or connected with the power of the State over taxation. It cannot be inferred that the legislature was impotent to amend or modify the law. It was held in Carpenter *v.* Pennsylvania (17 How., U. S., 456), that where an estate was actually in the process of settlement, it was competent for the State to impose a tax upon property not taxable at the time of the probate of the will. The remarks of Mr. Justice Campbell in that case upon the subject are convincing. The exact situation of the fund in this case as affected by the question is the following: For purposes of general construction and the derivation of title to the fund as it now stands, the gift of the remainder comes under the will of William H. Vanderbilt. When he died,
75 the law as it then existed made no provision for the taxation of the ultimate right of succession to the fund. The legal title to it upon the probate of his will was in his executors until they accounted in the surrogate's court, constituted the fund out of the assets of the estate, and transferred it from themselves as executors to themselves as trustees, which we assume in this case was done. Then they held the fund still under the will but undistributed and finally undistributable until the power of appointment was exercised by Cornelius Vanderbilt. Meantime, and while they held it so undistributed in fact, the State in the exercise of its general power of taxation, found it expedient to tax the right to the succession, which right had not theretofore been taxed, making the transfer consist in that act by which each of the appointees became entitled to claim and to receive the particular or specific distributive share allotted to him. Of the general power of the State to fix the time at which the right of succession shall be taxed, and to define what shall be a transfer within the meaning of that act, we have no doubt, so long as that definition does not involve a violation of either contract or vested rights; and, as we have said, no contract relation was established by the act of 1885.

Although the execution of a power may for certain purposes relate back to the instrument conferring the power, there was no complete vesting of an estate in the children of Cornelius Vanderbilt, under the power, until that power was exercised. That seems to have been directly held in the matter of Stewart (131 N. Y., 274). The only distinction in the facts between that case and this is that in the Stewart case the power was unlimited and here it is confined to a class, but in both, the particular persons and the specific amounts they are to receive could not be ascertained for the purposes of taxation until after the exercise of the power.

76 Until that power was exercised, there was no method of determining the amount each of the appointees should receive or of a tax.

The rule applies equally to those cases where the power of appointment is unlimited, in which cases the appointees may be liable for an unequal amount of tax, because of their unequal degrees of consanguinity. In such cases the amount of the tax can only be determined after the execution of the power. It seems to be certain that the transfer of this property should be the subject of a tax as well as every other transfer, and the law cannot be applied with more certainty than by making the tax relate to the date of the determination of the estate, both as to the person who is to enjoy and the amount to be enjoyed. If the right of succession to this fund was taxable, as we think it was, the legislature had the power to declare that the tax should be imposed as of the time at which the right to possession of the amount appointed of the fund to each remainderman became fixed and determined by the exercise of the power of appointment. While the appointees take by relation back so as to derive their title under William H. Vanderbilt's will, they must take their specific shares in designated amounts from the time of the execution of the power. And, we think, that the authority of the State to impose a tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment.

If the views above expressed are correct, then it is quite apparent that the property has not been taken without due process of law, but only in the ordinary exercise of the right of the State to impose burdens upon the citizens by way of taxation.

The order appealed from should be affirmed with costs.

All concur.

77 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 17th day of May, in the year of our Lord one thousand nine hundred and one, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, May 17th, 1901.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SR., Deceased.

Be it remembered that on the 3rd day of April, in the year of our Lord one thousand nine hundred and one, Alexander E. Orr & o'rs, as executors & trustees, &c.; Richard M. Hoe *et al.*, as executors & guardians, &c., and Robert Dows *et al.*, guardians, &c., the appellants in this proceeding, came here into the court of appeals, by Horace E. Deming, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department, and Comptroller of the State of New York and Comptroller of the City of New York, the respondents in said proceeding, afterward appeared in said court of appeals by Joseph W. Middlebrook, their attorney.

78 Which said notice of appeal and the return thereto filed, as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this proceeding argued by Mr. Horace E. Deming, of counsel for the appellants, and by Mr. Jabish Holmes, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court of the county of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be, and the same hereby is, affirmed with costs.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the surrogate's court of New York county before the surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogate thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *May 17th*, 1901.

I hereby certify that the preceding record contains a [SEAL.] correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

79 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the matter of the transfer tax upon the estate of David Dows, Senior, deceased, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal, at the city of Albany, this twentieth day of May, A. D. 1901.

W. H. SHANKLAND, *Clerk.*

80 In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Appeal from an order of the appellate division of the first department affirming an order of the surrogate of the county of New York imposing a transfer tax on a portion of the estate of David Dows, Senior.

Horace E. Deming and Julius Henry Cohen for appellants.
Jabish Holmes, Jr., and Joseph W. Middlebrook for respondents.

CULLEN, *J.:*

David Dows, Sr., died March 30th, 1880, leaving as a part of his estate a valuable piece of real property, which he devised to his trustees in trust to pay the income to his son, David Dows, Jr., during life, "and upon the death of my said son the said property, with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner, and upon such terms as he may legally impose. But in case my said son, David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit." A similar devise was made of a share of the testator's residuary estate. The will gave the trustees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations. David Dows, Jr., died January 13th, 1899, leaving a last will and testament, by which he exercised the power of appointment given him by the will of his father in favor of his three
81 sons. By his will he gave to each of his sons the income of three undivided forty-eighths till his son Robert attained the

age of twenty-one years or sooner died, of four-forty-eighths until Robert attained twenty-five years or sooner died, and nine-forty-eighths until Robert attained thirty years or sooner died. Thus each son was given the income of sixteen-forty-eighths, or one-third of the property. At the termination of these life estates the principal was given to another son—that is to say, to B was given the principal of the share, the income of which A had been receiving; to C the principal of what had been B's share, and to A the principal of C's share. In result, each son receives one-third of the property absolute, for the will provides "that each interest for life or remainder shall vest absolute and at once upon my death, in legal and not equitable ownership, and without contingency," but each son, instead of being given the remainder in his own share after Robert arrives at the age of thirty years, is given the remainder in another son's share, though the shares are exactly equal. The learned surrogate imposed a tax on the property passing under this power of appointment both on the life estates and on the remainders. His order was affirmed by the appellate division and an appeal has been taken to this court.

The first objection raised to the order of the surrogate's court is that the tax imposed under the amendment of April 16th, '97 (chap. 284), to the taxable transfer act of 1896, upon transfers made under a power of appointment, is a tax on property and not on the right of succession, and that therefore so much of the fund as was invested in incorporated companies liable to taxation on their own capital and in certain bonds of the State of New York and bonds of the city of New York exempt from taxation by statute was not subject to the tax. On this question we are concluded by the previous decisions of this court (Matter of Vanderbilt, 163 N. Y., 597;
82 affirmed on opinion of Justice Patterson, below, in 50 App. Div., at p. 246; same case cited without opinion, 166 N. Y., 640), and little need be now said thereon. The theory on which taxation on the devolution of estates at the death of their owner is based and its validity upheld in cases where the State seeks to reach United States securities is clearly established, not only by our own decisions (*In re* Swift, 137 N. Y., 77; Matter of Sherman, 153 N. Y., 1), but by those of the Supreme Court of the United States (Magoun *v.* Illinois Trust Co., 170 U. S., 283; Plummer *v.* Coler, 178 U. S., 115; Murdock *v.* Ward, 178 U. S., 139). In Magoun *v.* Trust Company it is said of such taxes: "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation." The same doctrine was again asserted in Knowlton *v.* Moore (178 U. S., 41). It is insisted, however, that the title of the present owners is de-

duced from the will of David Dows, Sr., and not from that of his son, David Dows, Jr., and in support of this claim are cited the cases of Genet *v.* Hunt (113 N. Y., 158) and Matter of Harbeck (161 N. Y., 211). The proposition is doubtless true to a certain extent. For the purpose of determining whether the execution of the power is in contravention of the statute of perpetuities, the estate created under such power must be referred back to the instrument granting the power. This is settled law and was so
83 held in Genet *v.* Hunt (*supra*). Any other rule would permit the evasion of the statute against perpetuities by the grant of powers. The decision in matter of Harbeck (*supra*) proceeded on the ground that at the time of the exercise of the power of appointment in that case the legislature had not provided for the taxation of transfers under such powers. But, whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the right of the testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Sr., devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself—that is, for the privilege of succeeding to property under a will. Had the fund passed in default of an exercise of the power of appointment a very different proposition would be presented. We express no opinion on the subject whether, under such circumstances, the tax imposed by the amendment of '97 could be deemed other than a tax on the property itself.

The second objection urged against the order appealed from is that at the death of David Dows, Sr., the property was real estate on which there was at that time no transfer tax as
84 against lineal descendants of the testator. In matter of Sutton (3 App. Div., 208; affirmed by this court on opinion below, 149 N. Y., 618) the will directed an equitable conversion of the realty into personalty. It was held that the actual form in which the property existed at the time of the testator's death determined its liability to a transfer tax, and that, being real estate, it was exempt. The same rule governs the present case. At the time of the execution of the power of appointment under the will of David Dows, Sr., the property was personal. As we have held that it was the execution of that power which subjects grantees under it to the transfer tax, it follows that the condition or form of the property at the time of such execution must control.

The third objection is that the legatees or devisees of the remain-

ders are not subject to taxation until the precedent estates terminate and the remainders vest in possession. Practically each son of David Dows, Jr., is bequeathed one-third of the fund absolutely, with the time of enjoyment in possession postponed. What motive dictated the curious shifting of remainders found in the will of David Dows, Jr., we do not know, nor is it necessary that we speculate thereon. We shall treat these remainders as they are given in the will—that is, at the termination of a life estate in another party. Still, under the statute, it is plain that they are presently taxable. Subdivision 4, section 220, of the tax act (amended by chap. 284, Laws of '97) directs that the tax shall be imposed "when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act." Section 222 of the same law provides that all taxes shall be due and payable at the time of the transfer, except that "taxes upon the transfer of any estate, property, or interest therein limited, conditioned, de-
85 pendent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Under a statute substantially the same in phraseology this court held, by Finch, J., in matter of Hoffman (143 N. Y., 327) that mere possibilities or chances of the acquisition of property, including not only contingent estates, but also estates technically vested, but liable to be divested, were not liable to taxation until the contingencies had passed or been fulfilled and the right to succeed to property become certain and absolute. This doctrine has no application to the remainders given to the sons of David Dows, Jr. They are absolute and not subject to be divested or to fail in any contingency whatever. By statute they are alienable, devisable, descendible, and if the property were real estate they could be sold on execution against their owners (Sheridan *v.* House, 4 Keyes, 569; Moore *v.* Littel, 41 N. Y., 66). By the aid of the table of annuities, upon the faith of which large sums are constantly distributed by the courts, the present value of these remainders is capable of ready computation. Therefore they do not fall within the exception of the statute and are subject to present taxation. Matter of Roosevelt (143 N. Y., 120) is not in conflict with this view. In that case it was held that certain vested remainders should not be taxed until the termination of the preceding life estate. The will then before the court bequeathed after the death of the life tenant seven life annuities contingent upon the survival of the life tenants by the annuitants, with cross-remainders among the annuitants themselves. These annuities, being contingent, were
86 not, under the rule declared by Judge Finch in the Hoffman case, taxable or their value ascertainable until they came into actual existence. The remainders given by the will were subject to these annuities. As the value of the annuities was not capable of ascertainment, the value of the remainders subject to those annuities

was necessarily equally incapable of computation. It was on this ground the decision proceeded. There is no such difficulty in the present case, and the decision of the Roosevelt case is therefore not in point.

The order appealed from should be affirmed with costs.

Parker, Ch. J.; O'Brien, Bartlett, Martin, Vann, and Landon, JJ., concur.

Order affirmed.

A copy.

E. A. BEDELL, *Reporter C.*

87 At a surrogate's court held in and for the county of New York, in the county court-house of said county, on the 28th day of May, 1901.

Present: Hon. Abner C. Thomas, surrogate.

In the Matter of the Transfer Tax upon the Estate of DAVID DOWS, SENIOR, Deceased.

Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, having duly appealed to the court of appeals from the order of the appellate division of the supreme court of the State of New York, bearing date and entered on the 28th day of March, 1901, a certified copy of which said order was entered and filed in the office of the clerk of this court on the 29th day of March, 1901, by which was affirmed the order of the surrogate herein filed and entered on the 6th day of March, 1901, by which was affirmed the report of the appraiser herein filed on the 8th day of February, 1901, and the order of the surrogate entered thereon fixing and assessing the tax, entered herein on the 15th day of February, 1901, and said appeal
88 having been heard in the court of appeals, thereafter by its remittitur the court of appeals having ordered and adjudged that said order of the said appellate division affirming said order of this court, as aforesaid, should be affirmed with costs, and that the record of the proceedings in said court of appeals be remitted to this court, to be proceeded upon according to law:

Now, upon reading said remittitur and upon motion of Joseph W. Middlebrook, Esq., attorney for Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, it is

Ordered that said remittitur be placed on file in this court; and it is further

Ordered that the said remittitur and judgment of the court of ap-

peals be, and it hereby is, made the judgment and order of this court; and it is further

Ordered that the order of this court made and entered herein on the 6th day of March, 1901, be, and the same hereby is, in all respects affirmed, with costs to said Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, of said appeal to the court of appeals in the sum of $150.00, and his disbursements upon said appeal, amounting to the sum of $20.80, making in all the sum of $170.80.

ABNER C. THOMAS, *Surrogate.*

Approved as to form and costs.

HORACE E. DEMING,
Appellants' Attorney.

STATE OF NEW YORK, }
County of New York, } ss:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the order of affirmance by the appellate division and the notice of appeal to the court of appeals, together with the notices of appeal and decree in the matter of the transfer tax upon the estate of David Dows, Sr., deceased (also copy of opinion from the court of appeals and order of affirmance, remittitur from court of appeals and order on remittitur), with the originals thereof in this office, and have found the same to be true and correct copies of such originals, and the same, with the originals thereof, are all the papers upon which said order and decree was made.

New York Surrogate's Seal.

In testimony whereof I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York this 14th day of June, in the year of our Lord one thousand nine hundred and one.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

{ Ten-cent U. S. internal-revenue stamp, canceled June 14, '01. J. F. McL. }

89 [Endorsed:] Surrogate's court, New York county. In the matter of the transfer tax upon the estate of David Dows, Sr., deceased. Order on remittitur. Joseph W. Middlebrook, attorney for respondent, by Jabish Holmes, Jr., of counsel. (Surrogate's clerk's certificate within.)

90 To the Honorable Rufus W. Peckham, justice of the Supreme Court of the United States:

And now come Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of

David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, by Horace E. Deming, their attorney, and complain that in the record and proceedings and also in the rendition of an order or decree in the suit entitled "In the matter of the transfer tax upon the estate of David Dows, Sr., deceased," which is in the surrogate's court of the county of New York, in the State of New York, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to the said surrogate's court of the county of New York the record in the said suit, with an order affirming an order and decree theretofore rendered in the appellate division of the supreme court of the State of New York on the 28th day of March, 1901, affirming an order of said surrogate's court of the county of New York filed and entered therein on the 6th day of March, 1901, by which was affirmed the report of the appraiser therein filed on the 8th day of February, 1901, and the order of said court entered thereon on the 15th day of February, 1901; which said remittitur of the court of appeals directed that an order be entered in said surrogate's court of the county of New York in favor of the said Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, against
91 Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, upon which direction and order a decree of affirmance was entered in said surrogate's court of the county of New York on the 28th day of May, 1901, with costs, wherein was drawn in question the validity of all the provisions of a statute of the State of New York which purport to enforce a tax upon the whole or any part of the property appraised therein, and the authority and jurisdiction exercised thereunder by the surrogate and the appraiser, upon the grounds that such provisions are repugnant to the Constitution of the United States, and the decision was in favor of such their validity, all of which appears in the record and proceedings in said suit, manifest errors have happened, to the great damage of the said Alexander E. Orr *et al.*, as executors of the last will and testament of David Dows, Sr., deceased; Richard M. Hoe *et al.*, as executors of the last will and testament of David Dows, Jr., deceased, and Tracy Dows *et al.*, as guardians of the property of David Dows, 3rd, *et al.*, as aforesaid.

Wherefore the said Alexander E. Orr *et al.*, by their attorney aforesaid, pray for the allowance of a writ of error and such other

proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

HORACE E. DEMING,
Attorney for Petitioners, 11–13 *William Street*,
Borough of Manhattan, New York City, N. Y.

92 Allowed June 10, 1901.
R. W. PECKHAM,
Justice of the Supreme Court of the United States.

93 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, *vs.* Theodore P. Gilman *et al.*, defendants in error. Petition. Horace E. Deming, solicitor for petitioners, 11 & 13 William street, Manhattan, New York, N. Y.

94 In the Supreme Court of the United States, —— Term, 1901.

ALEXANDER E. ORR ET AL., as Executors and Trustees of David Dows, Sr., Deceased; Richard M. Hoe *et al.*, as Executors of David Dows, Jr., Deceased, and Tracy Dows *et al.*, as Guardians of David Dows, 3rd, *et al.*, Infants, Plaintiffs in Error,
vs.
THEODORE P. GILMAN, as Comptroller of the State of New York, and Bird S. Coler, as Comptroller of the City of New York, Defendants in Error.

And now come the plaintiffs in error, by their attorney and counsel, and respectfully represent that they and each of them feel themselves to be aggrieved by the proceedings, order, and decree of the surrogate's court of the county of New York in this cause, as affirmed by the judgment of the court of appeals of the State of New York, and assign error thereto as follows, that is to say:

I.

The alleged basis for the proceedings in said surrogate's court is subdivision 5 of section 220 of article X (entitled Taxable transfers) of the tax law of the State of New York (chapter 908, Laws of 1896), as amended by chapter 284 of the Laws of 1897, so as to read as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appoint-

ment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the
95 possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Said subdivision of section 220, as amended, is unconstitutional, null, and void under section 1 of the fourteenth amendment to the Constitution of the United States, in that it seeks to abridge the privileges and immunities of citizens of the United States, to deprive such citizens of property without due process of law, and to deny to such citizens the equal protection of the laws.

1. Under the law as it stood at his death, in 1890, the testator, David Dows, Sr., had the undoubted legal right to transfer by will his property or any interest therein to his grandchildren, David Dows, 3rd, Robert Dows, and Kenneth Dows, without any diminution or impairment because of any burden imposed by the State upon the exercise of that right. He exercised this right, and at his death, in 1890, his said grandchildren (then living) acquired vested rights in the property transferred. This amendment attempts to diminish and impair their vested rights. It seeks in 1899 to exact a price for a privilege lawfully exercised in 1890, and thus to take from Mr. Dows' grandchildren a portion of the very property the full right to which had vested in them many years before.

It is therefore unconstitutional and void.

2. This amendment seeks to subject certain property to higher taxation than is imposed upon like property of other individuals in the same community.

3. This amendment, according to no system or principle of classification whatsoever, imposes an arbitrary rate of tax upon the property of an arbitrarily selected class. If there happens to be
96 a power of appointment, whether such power of appointment has been exercised or not, every piece of property as to which the power was or might have been exercised is arbitrarily singled out and is taxed at rates varying with the purely accidental circumstances that the person receiving the property is nearly or remotely or not at all related to the donee of the power.

4. This amendment imposes an unequal, arbitrary, and discriminating tax upon property. Its classification of persons and property is not based upon any reasonable ground, but is a mere arbitrary selection.

5. This amendment attempts, by arbitrary definition, to change the character of a thing by merely changing its name and by pro-

nouncing that a transfer which is not a transfer to take away the vested property rights of citizens.

II.

The said transfer tax law of the State of New York expressly exempts from taxation all real estate passing to lineal descendants (section 221); said exemption is a general exemption and applies to all estates. Under the definitions in the act, as interpreted by the courts of the State of New York, all property which was real estate at the time of the death of the person owning it continues, as to the lineal descendants, to be real estate, and is therefore exempt from taxation, though such descendants may not enter into possession and enjoyment of the property until years after the death of the owner and the property, in the meantime, has been converted into cash or securities.

The decision of the court below in this cause reverses this rule and holds that this exemption only applies to lineal descendants whose property may not have been mentioned in a power of appointment, and that as to lineal descendants whose property has
97 been so mentioned the character of the property at the time of the death of the donee of the power (exercised or unexercised) controls; that in the case at bar, although over two millions of dollars of the property was real estate at the death of David Dows, Senior, descending to lineal descendants, they are deprived of the exemption under section 221, and the real estate is held taxable. By depriving the lineal descendants of David Dows, Senior, of the benefits of the general exemption established by section 221, the plaintiffs in error submit that said amendment of 1897 and the proceedings of the court below in this cause are unconstitutional under the fourteenth amendment to the Constitution of the United States, in that they deprive them of the equal protection of the laws, abridge their privileges and immunities as citizens of the United States, and take their property without due process of law.

III.

The plaintiffs in error submit that in violation of the fourteenth amendment to the Constitution of the United States they have been deprived by the proceedings in this cause of the equal protection of the laws of the said State of New York, their privileges and immunities as citizens of the United States are abridged, and their property taken without due process of law in the following respects:

(1.) Under section four, subdivision sixteen, of said tax law of said State of New York all stocks in incorporated companies liable to taxation upon their capital are exempt from taxation. Despite the protests of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $1,850,000.00 of such stocks of incorporated companies.

(2.) Under chapter eighty of the Laws of 1897 of said State of New York, amending section four of subdivision six of said tax
98 law, bonds thereafter issued for the improvement of the canal of said State of New York are made exempt from taxation. Despite the protest of these plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $51,000 of New York State canal-improvement bonds.

(3.) Under said chapter eighty of said Laws of 1897, as well as under section seven of the municipal corporations law of said State of New York (chapter six hundred and eighty-five of the Laws of 1892) bonds theretofore issued for the purpose of paying up or retiring the indebtedness of a municipal corporation are exempted from taxation. Despite the protest of the plaintiffs in error, there is included in the property held subject to taxation in this cause by the judgment of the court of highest jurisdiction in said State upwards of $109,000.00 of such municipal corporation bonds.

The plaintiffs in error further submit that the proceedings hereunder are in violation of section ten of article one of the Constitution of the United States in the following respects:

The said statute of the State of New York under which said canal-improvement and municipal bonds were exempted from taxation formed part of the contracts under which said bonds were purchased. The statute under which said court of appeals in this cause holds such bonds now taxable is, therefore, an impairment of the obligation of the contracts under which said bonds were purchased.

IV.

The plaintiffs in error submit that even if said subdivision 5 of section 220 of the transfer tax law be valid the various re-
99 mainders vesting in David Dows, 3rd, Robert Dows, and Kenneth Dows cannot be taxed until the remaindermen come into actual enjoyment and possession of the property, and that the construction of the transfer tax act under which such remainders are held in this cause to be presently taxable is in conflict with section one of the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, deprives such citizens of property without due process of law, and denies to such citizens the equal protection of the laws.

Wherefore the said Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April,

1899, the plaintiffs in error herein, pray this honorable court to examine and correct the errors assigned and for a reversal of the order and decree of the said surrogate's court of the county of New York in this cause.

ALEXANDER E. ORR,
RICHARD M. HOE,
TRACY DOWS,
WILLIAM A. NASH, AND
GEORGE B. COOKSEY,
As Executors and Trustees of the Last Will and Testament of David Dows, Sr., and
RICHARD M. HOE AND
TRACY DOWS,
As Executors of the Last Will and Testament of David Dows, Jr., and
RICHARD M. HOE AND
TRACY DOWS,
As Guardians of the Property of David Dows, 3rd, Robert Dows, and Kenneth Dows, Appointed as Such Guardians by the Surrogate of Westchester County, State of New York, on the 8th Day of April, 1899,
By HORACE E. DEMING,
Solicitor for Plaintiffs in Error, 11–13 William Street, Borough of Manhattan, City of New York, New York.

100 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, vs. Theodore P. Gilman *et al.*, defendants in error. Assignment of errors. Horace E. Deming, solicitor for plaintiffs in error, 11 & 13 William street, Manhattan, New York, N. Y.

101 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the surrogate's court of the county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled "In the matter of the transfer tax upon the estate of David Dows, Sr., deceased," wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, as by their complaint appears, we, being willing that
102 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

103 [Endorsed:] In the Supreme Court of the United States, —— term, 1901. Alexander E. Orr *et al.*, plaintiffs in error, vs. Theodore P. Gilman *et al.*, defendants in error. Writ of error. Horace E. Deming, solicitor for petitioners, 11 & 13 William street, Manhattan, New York, N. Y.

104 UNITED STATES OF AMERICA, *ss:*

To Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court of the county of New York, State of New York, wherein Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustee- of the last will and testament of David Dows, Sr., and Richard M. Hoe and Tracy Dows, as executors of the last will and testament of David Dows, Jr., and Richard M. Hoe and Tracy Dows, as guardians of the property of David Dows, 3rd, Robert Dows, and Kenneth Dows, appointed as such guardians by the surrogate of Westchester county, State of New York, on the 8th day of April, 1899, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this thirteenth day of June, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

105 [Endorsed:] In the Supreme Court of the United States. Alexander E. Orr *et al.*, plaintiffs in error, against Theodore P. Gilman and ano'r, defendants in error. Citation. Horace E. Deming, attorney for plaintiffs in error, 11 & 13 William street, Manhattan, New York, N. Y.

106 In the Supreme Court of the United States, May Term, 1901.

ALEXANDER E. ORR ET AL., as Executors and Trustees of David Dows, Sr., Deceased; Richard M. Hoe *et al.*, as Executors of David Dows, Jr., Deceased, and Tracy Dows *et al.*, as Guardians of David Dows, 3rd, *et al.*, Infants, Plaintiffs in Error,

vs.

THEODORE P. GILMAN, as Comptroller of the State of New York, and Bird S. Coler, as Comptroller of the City of New York, Defendants in Error.

Please enter my appearance as counsel for the defendants in error. I hereby waive the issuance of citation and waive all security for costs or otherwise on this writ of error.

June 10th, 1901.

JABISH HOLMES, JR.,

Attorney for Defendants, 32 *Liberty Street, New York City.*

To James H. McKenney, clerk.

107 [Endorsed:] In the Supreme Court of the United States. Alexander E. Orr *et al.*, plaintiffs in error, against Theodore P. Gilman and another, defendants in error. Notice of appearance. Waiver of bond and issuance of citation. Jabish Holmes, Jr., attorney for defendants in error, 32 Liberty street, Manhattan, New York, N. Y.

Endorsed on cover: File No., 18,204. New York surrogate's court, county of New York. Term No., 351. Alexander E. Orr, Richard M. Hoe, Tracy Dows, William A. Nash, and George B. Cooksey, as executors and trustees of the last will and testament of David Dows, Sr., *et al.*, plaintiffs in error, *vs.* Theodore P. Gilman, comptroller of the State of New York, and Bird S. Coler, comptroller of the city of New York. Filed June 20th, 1901.